

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1932

No. 5844

301

MARY HALLER, APPELLANT,

Guy J. Helvering, vs.

~~DAVID BURNET~~, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED NOVEMBER 7, 1932.

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Court of Appeals of the District of Columbia

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No. 5844

MARY HALLER, APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

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INDEX.

	Original	Print
Docket entries.....	1	1
Petition	2	2
Answer	15	12
Amendment to petition.....	17	13
Amendment to answer.....	18	14
Findings of fact and opinion.....	20	15
Decision	36	26
Stipulation of venue.....	37	27
Petition for review.....	38	28
Præcipe	46	33
Certificate	48	34

Court of Appeals of the District of Columbia

No. 5844.

MARY HALLER, Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue,

1

Docket No. 39268.

MARY HALLER

vs.

COMMISSIONER OF INT. REV.

For Taxpayer: Wm. J. Byrne, Esq., Joseph Getz, Esq.
For Commissioner: J. D. Foley, Esq., C. C. Maddox, Esq.

Docket Entries.

1928.

- June 12. Petition received and filed. Taxpayer notified.
(Fee paid.)
“ 13. Copy of petition served on General Counsel.
Aug. 10. Answer filed by G. C.
“ 13. Copy of answer served on taxpayer. General
Calendar.

1931.

- Sept. 17. Hearing set Nov. 2, 1931.
Oct. 3. Motion for continuance filed by taxpayer.
Granted to Jan. 25, 1932.
Dec. 19. Application to take depositions filed by taxpayer.
“ 26. Motion to change date to Jan. 12, 1932 to take
depositions filed by taxpayer.
“ 31. Motion to deny application to take depositions
filed by G. C.

1932.

- Jan. 5. Order to take depositions of Mrs. Mary Haller, Frank Haller, E. W. Haller, Charles J. Haller, J. M. Miller & Albert M. Doll, entered.
- “ 15. Motion for continuance to 2-1-32 filed by taxpayer. 1-20-32 granted, continued to Jan. 28, 1932.
- “ 20. Depositions filed (3). Copies served by Board.
- “ 28. Hearing had before E. H. Van Fossan, Div. 9, on the merits. Motion to amend answer filed. Depositions of Chas. Haller et al. (7) filed. Briefs due 30 days from date. No reply briefs.
- Feb. 19. Transcript of hearing Jan. 28, 1932 filed.
- “ 24. Motion for 30 day extension to file Brief—filed by taxpayer. 2-27-32 Granted.
- “ 27. Brief filed by G. C.
- Mar. 28. Brief filed by taxpayer.
- June 13. Findings of fact and opinion rendered, E. H. Van Fossan, Div. 9. Decision will be entered for respondent.
- “ 16. Decision entered, Div. 9.
- Sept. 13. Stipulation of Venue filed.
- “ 13. Petition for review by the Court of Appeals of the District of Columbia, with assignments of error, filed by taxpayer.
- “ 13. Proof of service filed.
- “ 13. Præcipe filed—proof of service thereon.
- 2 [Stamp:] Filed Jun. 12, 1928, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 39268.

MARY HALLER, Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his notice of deficiency (IT:AR:B-4 MKR-60D), dated May 29, 1928, and as the basis of her proceeding, alleges as follows:

1. The petitioner is an individual residing at 515 West 7th Street, Erie, Pennsylvania.

2. The notice of deficiency, a copy of which is attached and marked Exhibit "A", was mailed to the petitioner on May 29th, 1928.

3. The taxes in controversy are income taxes for the calendar years 1924 and 1925 and for \$4,130.55.

4. The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) That the Commissioner has erred in distributing the net income of the Estate of Jacob Haller, Deceased, to the widow, Mary Haller, the taxpayer, as being *alone* entitled to all the net profits of the business, and in finding that she takes this net income unimpressed by a trust in favor of the children, as shown by the will of Jacob Haller.

3 (b) That the Commissioner has erred in disregarding the distribution of the net income of the business to the widow and six children in equal shares, as shown by the books kept by the executors, as shown by the intent and intention of the parties interested therein and by the returns filed by each individual showing a pro rata distribution of the business income.

(c) That the Commissioner has erred in not finding that the will of Jacob Haller definitely created an express trust for the benefit of the widow and children to share in the income, share and share alike, as shown by the specific intent of the testator and which should have been implied from precatory words contained in the provisions of his will.

(d) That the Commissioner has erred in disregarding the intent of the testator relative to the basis of the distribution of the income, as expressed to the widow and beneficiaries and executors, and the specific understanding of such intent as carried out by the executors, trustees and beneficiaries in the making of distributions to the beneficiaries and the widow, share and share alike.

(e) That the Commissioner has erred in not considering the effect on the basis of distributions during the current years of the effect of the retention of the income of the estate in prior years and of the children having reached

majority, and that such retention of income would constitute a situation wherein the widow had made ipso facto gifts to the children of profits in excess of her actual drawings, and which created a capital interest in the business of the children from which a share of the profits should accrue and which affected the portion of income distributable to the widow.

(f) That the Commissioner has erred in applying a local precedent as a basis of determining the tax liability under a specific Federal Statute.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Mary Haller, the taxpayer, is a citizen of the United States, residing at No. 515 West 7th Street, Erie, Pa.

(b) Mary Haller was the widow of Jacob Haller, a citizen of the United States and resident of Erie, Pa.

(c) Jacob Haller died on July 1, 1895 and his will, with codicils attached was filed with the Registrar for the Probate of Wills for the County of Erie on July 9, 1895.

(d) Jacob Haller was engaged in the wholesale and retail grocery business in the City of Erie from 1873 to the time of his death.

(e) By a codicil to his will, executed in 1895, his executors were directed to continue his business as long as it could be carried on at a reasonable profit and to pay out of the net profits of the business, as indicated in the following language:

5 "The net profits thereof to be paid to my wife for the support of herself and my children during her natural life; but in case she should marry again, then said profits shall be paid by my executors to my children or their legal representatives for their maintenance and support."

(f) A small portion of the net income was actually distributed to the widow, the remainder being retained in the business.

(g) It was the intention of the testator that his children continue the conduct and operation of his business and that the net income should go to the widow and the seven surviving children, share and share alike.

(h) It was the understanding of the widow and the children and the executors that, in accordance with the pro-

visions of the will, the widow and each of the seven children were entitled to an equal share in the net income of the business.

(i) The will also provided that certain real estate located on Nos. 1221-25 State Street, Erie, Pennsylvania should be left to the children but that the widow should receive the income thereof during her natural life.

(j) The testator did not specifically direct that the executors should take title to the business property as trustees, but the executors had been acting in the capacity of trustees and not as executors, administering the estate while they are carrying on the business.

6 (k) All of the children had reached majority on January 1, 1912. Most of the children were actively engaged in the conduct of the business and received salaries for the services they performed. The widow, Mrs. Mary Haller, performed no services and received no salary, withdrawing nominal amounts as her needs required.

(l) The will provided that the income from the property located at Nos. 1221-25 State Street, was to be paid over to the widow, Mary Haller, during her natural life.

(m) For the calendar years 1924 and 1925 there was filed by Charles J. Haller as trustee of the estate of Jacob Haller, a return on form 1041 which showed net income of \$22,335.76 for 1924 and \$39,113.99 for 1925.

(n) The net income shown on the return for the year 1924 was shown in item 17 as distributable to the beneficiaries as follows:

Name and address of each beneficiary.	Divi- dends.	Other income.	Income tax paid at source.
Mary Haller, 515 W. 7th St., Erie, Pa. . . .	\$134.58	\$3,056.25	\$4.77
Charles J. Haller, 818 Washington Pl., Erie, Pa.	134.57	3,056.25	4.77
Edward W. Haller, 419 West 10th St., Erie, Pa.	134.57	3,056.25	4.77
Frank A. Haller, 717 German St., Erie, Pa.	134.57	3,056.25	4.77
Cora E. Haller Gaehr, 1836 Wilton Road, Cleveland Heights, Ohio.	134.57	3,056.25	4.76
Alma C. Haller, 515 West 7th St., Erie, Pa.	134.57	3,056.25	4.76
Leah A. Haller Schubert, Port Dover, Ontario, Canada.	134.57	3,056.26	4.76
Totals	\$942.00	\$21,393.76	\$33.36

7 (o) The net income shown on the return for the year 1925 was shown in item 17 as distributable to the beneficiaries as follows:

Name and address of each beneficiary.	Divi- dends.	Other income.	Income tax paid at source.
Mary Haller, 515 W. 7th St., Erie, Pa...	\$27.54	\$5,560.18	\$2.40
Charles J. Haller, 818 Washington Pl., Erie, Pa.....	27.54	5,560.18	2.40
Edw. W. Haller, 419 W. 10th St., Erie, Pa.	27.54	5,560.17	2.40
Frank A. Haller, 1028 W. 7th St., Erie, Pa.	27.54	5,560.17	2.40
Cora E. Haller Gaehr, 1836 Wilton Rd., Cleveland Hgts., Ohio.....	27.53	5,560.18	2.40
Alma C. Haller, 515 W. 7th St., Erie, Pa.	27.53	5,560.18	2.40
Leah A. Haller Schubert, Port Dover, Ontario, Canada.....	27.53	5,560.18	2.40
Totals	\$192.75	\$38,921.24	\$16.80

(p) On January 1, 1924 the net worth of the estate as shown on the books was divided into capital accounts as follows:

Mary Haller	\$38,925.23
Charles J. Haller	49,470.83
Edward W. Haller	49,470.83
Frank A. Haller	49,470.83
Cora E. Haller	49,470.82
Alma C. Haller	49,470.82
Leah O. Haller	49,470.82

(q) The net worths of each of the individuals created a capital interest in the assets of the business by the widow and each of the children in the shares indicated.

8 (r) At the close of 1924 the net income for the year as shown by the books was credited to the respective accounts as follows:

Mary Haller	\$3,190.83
Charles J. Haller	3,190.82
Edward W. Haller	3,190.82
Frank A. Haller	3,190.82
Cora E. Haller	3,190.82
Alma C. Haller	3,190.82
Leah O. Haller	3,190.83

(s) At the close of 1925 the net income for the year as shown by the books was credited to the respective accounts as follows:

Mary Haller	\$5,587.72
Charles J. Haller	5,587.72
Edward W. Haller	5,587.71
Frank A. Haller	5,587.71
Cora E. Haller	5,587.71
Alma C. Haller	5,587.71
Leah O. Haller	5,587.71

(t) Charles J. Haller, Edward W. Haller, Frank A. Haller, beneficiaries of the estate, were in active management and control of the business.

(u) On December 31, 1925 a final accounting was filed, the executors were discharged and the assets were distributed to the beneficiaries, share and share alike.

6. The petitioner prays for relief from the deficiencies asserted by the respondent on the following particulars:

9 (a) That the net income from the Estate of Jacob Haller is distributable to the widow and each of the children $1/7$ th each, and the widow is not required to consider as taxable income any amount in excess of $1/7$ th of the taxable income.

Wherefore petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

JOSEPH GETZ,
JOSEPH GETZ,
Counsel for Petitioner,
(*Certified Public Accountant.*)

570 Seventh Avenue, New York, N. Y.

WILLIAM J. BYRNE,
Attorney for the Petitioner.

758 Munsey Bldg., Washington, D. C.

10 STATE OF PENNSYLVANIA,
City of Erie,
County of Erie, ss:

Mary Haller, hereby duly sworn, says that she is the petitioner above named; that she has read the foregoing

petition, or had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to these facts stated to be upon information and belief, and these facts she believes to be true.

MRS. MARY HALLER.

Subscribed and sworn to before me this 11 day of June, 1928.

[Seal of George K. Frank, Notary Public, Erie, Pa.]

GEO. K. FRANK,
Notary Public.

Notary Public commission expires January 21st, 1931.

11

EXHIBIT "A".

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:AR:B-4 MKR-60D.

May 29, 1928.

Mrs. Mary Haller,
1711 Parade Street,
Erie, Pennsylvania.

MADAM:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924 and 1925 discloses a deficiency of \$4,130.55 as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,

D. H. BLAIR,
Commissioner,
By C. B. ALLEN,
Deputy Commissioner.

Inclosures: Statement, Form A, Form 882.

12

EXHIBIT "A".

IT:AR:B-4 MKR-60D.

Statement.

In re Mrs. Mary Haller, 1711 Parade Street, Erie, Pennsylvania.

Year.	Deficiency in tax.
1924	\$1,113.32
1925	3,017.23
Total	<u>\$4,130.55</u>

The report of the Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania, has been reviewed and approved by this office.

The adjustment of your net income is shown as follows:

1924.

Net Income reported.....	\$2,298.52
Add:	
1. Income from the Estate of Jacob Haller.....	19,832.91
	<u>\$22,131.43</u>
Deduct:	
2. Additional contributions allowable.....	1,077.87
	<u>\$21,053.56</u>
Net income adjusted.....	\$21,053.56
Computation of Tax.	
Net income adjusted.....	\$21,053.56
Less:	
Dividends	\$942.00
Personal exemption.....	1,000.00
	<u>1,942.00</u>
Balance subject to normal tax....	<u>\$19,111.56</u>

13	Normal tax at 2% on \$4,000.00.....	\$80.00
	Normal tax at 4% on \$4,000.00.....	160.00
	Normal tax at 6% on \$11,111.54.....	666.69
	Surtax on \$21,053.56.....	272.68
	Total tax	<u>\$1,179.37</u>

Less:

Earned income credit	\$20.00	
Tax paid at source	33.36	
		<u>53.36</u>
Tax assessable		\$1,126.01
Tax previously assessed		<u>12.69</u>
Deficiency		\$1,113.32

Explanation of Changes.

1. Information submitted in the Revenue Agent's report covering an investigation of the returns filed for the Estate of Jacob Haller indicates that the will of the testator provided that the business which he owned prior to his death should be carried on and that the net profits therefrom should be paid to you for the support of yourself and your children during your natural life.

The facts in the case appear to be similar to those outlined in Solicitor's Memorandum 2699, published in Cumulative Bulletin IV-I, Page 189, in which it was held that the entire net income of the estate was distributable to the widow and therefore taxable to her.

The entire net income from the Estate of Jacob Haller as shown in the revenue agent's report in the amount of \$23,023.74 has, therefore, been included in your net income. Since you reported \$3,190.83 from this source, your net income has been increased to \$19,832.91.

2. The total contributions of \$905.00 made by the Estate of Jacob Haller have been allowed as a deduction from your net income. Other contributions have been allowed in the amount of \$550.00. Since you deducted contributions of \$337.13, you are allowed a further deduction of \$1,077.87.

1925.

Net income reported	\$4,690.49
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Add:

1. Income from the Estate of Jacob Haller ..	33,596.27
	<u>\$38,286.76</u>

14 Brought forward	\$38,286.76
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Deduct:

2. Contributions	<u>1,053.68</u>
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Net income adjusted	\$37,233.08
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Computation of Tax.

Net income adjusted.....		\$37,233.08
Less:		
Dividends	\$192.75	
Personal exemption	1,500.00	
		<u>1,692.75</u>
Balance subject to normal tax.....		<u>\$35,540.33</u>
Normal tax at 1½% on \$4,000.00.....		\$60.00
Normal tax at 3% on \$4,000.00.....		120.00
Normal tax at 5% on \$27,540.33.....		1,377.02
Surtax on \$37,233.08.....		<u>1,523.31</u>
Total tax		\$3,080.33
Less:		
Earned income credit.....	\$13.12	
Tax paid at source.....	16.80	
		<u>29.92</u>
Tax assessable.....		\$3,050.41
Tax previously assessed.....		<u>33.18</u>
Deficiency		\$3,017.23

Explanation of Changes.

1. The entire net income from the Estate of Jacob Haller as shown in a revenue agent's report in the amount of \$39,183.99 has been included in your net income for the reasons given in the foregoing paragraphs. Since you reported \$5,587.72 from this source, on your return, your net income has been increased to \$33,596.27.

2. The total contributions of \$1,229.30 made by the Estate of Jacob Haller have been allowed as a deduction on your return. Since you deducted 1/7 of this amount on your return, you are allowed a further deduction of \$1,053.68.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

15 [Stamp:] Filed Aug. 10, 1928, United States Board
of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 39268.

MARY HALLER (MRS.), Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Answer.

The Commissioner of Internal Revenue, by his Attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, 3. Admits the allegations in paragraphs 1, 2 and 3.

5 (a). Admits the allegations in paragraph 5 (a).

5 (b), (c), (d), (e), (f). For lack of information upon which to base a belief, denies the allegations in paragraphs 5 (b), (c), (d), (e), and (f).

5 (g), (h). Denies the alleagtions in paragraphs 5 (g) and (h).

5 (i), (j), (k), (l). For lack of information upon which to base a belief, denies the allegations in paragraphs 5 (i), (j), (k), (l).

5 (m), (n), (o). Does not regard as material and therefore denies the allegations in paragraphs 5 (m), (n) and (o).

5 (p). For lack of information upon which to base a belief, denies the allegations in paragraph 5 (p).

5 (q). Denies the allegations in paragraph 5 (q).

5 (r), (s), (t), (u). For lack of information upon which to base a belief, denies the allegations in paragraphs 5 (r), (s), (t) and (u).

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore expressly admitted, qualified or denied.

16 Wherefore it is prayed that the petition be denied.

(Signed)

C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

Of counsel:

JOHN D. FOLEY,

Special Attorney,

Bureau of Internal Revenue.

7/25/28.

17 United States Board of Tax Appeals.

Docket No. 39268.

MARY HALLER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amendment to Petition.

(Read into the record at hearing on January 28, 1932.)

Mr. Getz: * * * I would like to move the Board to amend the petition in regard to clarifying certain of the allegations of error, to add as an allegation of error (g) under paragraph 4 the following:

“That the Commissioner has ignored the fact that over a long period of years prior to the formal partnership arrangement in 1926, that the widow and children conducted the partnership in fact as borne out by the acts, agreements and conduct of all of the interested parties.”

* * * * *

Mr. Foley: No objection.

The Member: The petition will be amended in the language and form as indicated by counsel for the petitioner.

18 [Stamp:] U. S. Board of Tax Appeals. Filed at
Hearing Jan. 28, '32.

United States Board of Tax Appeals.

Docket No. 39268.

MARY HALLER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amendment to Answer.

Now comes the Commissioner of Internal Revenue, respondent herein, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and leave so to do having been asked and received, files this amendment to his answer heretofore filed in this appeal.

Respondent says that this petitioner duly filed with this Board two certain petitions of appeal from two certain notices of deficiencies in income tax proposed by the Commissioner of Internal Revenue for the calendar years 1917 to 1923, inclusive, which said petitions were docketed by the Board under docket numbers 14063 and 25751; that said petitions were duly answered by the Commissioner of Internal Revenue; that among the issues raised by said petitions and the answers thereto were the issues whether under the will of Jacob Haller and the codicil thereto the petitioner herein was entitled to a life interest in all the net income of the business which had been carried on by said Jacob Haller during his lifetime and whether there was any agreement between the petitioner and the children of Jacob Haller whereby the provisions of said Jacob Haller's will had been modified or superseded so as to vest in the petitioner and said children equal interests in the income derived from said business; that said appeals were duly heard by this Board; that on to wit November 28, 1928, this

19 Board duly promulgated its interlocutory decision containing its findings of fact and opinion wherein it held that the petitioner was, under the terms of the will and the codicil thereto, entitled to the entire net income of the business and that there was no definite evidence of any agreement between the petitioner and said children whereby the provisions of the will and of the codicil thereto were modified or superseded; that on to wit May 28, 1929, this Board duly entered its orders of redetermination

wherein it redetermined the deficiencies in income tax due from the petitioner for the calendar years 1917 to 1923, inclusive.

The respondent says that the issues raised in the present appeal are the same issues which were raised by petitioner in the appeals under docket numbers 14063 and 25751; that said issues were decided by this Board on the merits; that the interlocutory decision and the orders of redetermination entered by the Board in docket numbers 14063 and 25751 are res adjudicata and that petitioner should not be heard to litigate again the issues decided in the earlier appeals.

Wherefore respondent prays that the petition be dismissed and that the deficiencies determined by him in this appeal be redetermined to be the petitioner's deficiencies in tax.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of counsel:

JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

11d.

1/27/32.

J. D. F.

Jan. 27, 1932. F. L. C.

20 A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

26 B. T. A., —.

United States Board of Tax Appeals.

Docket No. 39268.

MARY HALLER, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated June 13, 1932.

The evidence failed to prove that in the taxable years an agreement of partnership existed between petitioner and her six children.

An earlier decision of the Board involving the same petitioner and the same general questions for previous tax years is conclusive as to the questions litigated for those years. The identical question having been involved, that decision is conclusive as to the construction of the will of petitioner's decedent.

Joseph Getz, Esq., and Wm. J. Byrne, Esq., for the petitioner.

J. F. Foley, Esq., and C. C. Maddox, Esq., for the respondent.

This proceeding was brought for the redetermination of deficiencies in income taxes for the years 1924 and 1925 in the respective sums of \$1,113.32 and \$3,017.23.

The questions presented for solution are: (1) Whether or not the will of Jacob Haller, deceased, who was the husband of petitioner, bequeathed solely to the petitioner the entire income to be derived from a certain grocery business to be carried on by the executors of the decedent's estate.

(2) Whether or not a partnership in the profits of the grocery business existed during the taxable years between the petitioner, her children and stepchildren.

21 The respondent, by his amended answer, alleges in effect that the questions of law and fact involved in this proceeding were decided adversely to the same petitioner in *Mary Haller*, 14 B. T. A. 488; that the issues in this proceeding are therefore *res adjudicata* and that the petitioner should not be heard to litigate these issues again. At the hearing herein the pleadings in those proceedings which involved the years 1917 to 1923, both inclusive, the Board's decision and the orders of redetermination were submitted and received in evidence.

The testimony of the petitioner's witnesses in this proceeding was taken by deposition.

Findings of Fact.

The petitioner resides at Erie, Pennsylvania, and is the widow of Jacob Haller, deceased, who died in 1895. The petitioner had not been previously married when she married Jacob Haller but the latter was a widower, having

three sons by his first marriage, namely, Charles, Frank and Edward. Four children were born to Jacob Haller and the petitioner and at the time of his death the ages of the decedent's children were the following: Charles, 20; Frank, 18; Edward, 16; Cora, 13; Otto, 11; Leah, 7; and Alma, 5, the last four named being the children of the petitioner. The son, Otto, died long before the date of these proceedings, and before the taxable years in question.

Upon his death Jacob Haller's last will and testament and a codicil thereto were duly admitted to probate in Erie County, Pennsylvania, and letters testamentary were
22 issued to the executors therein named. The codicil which was dated May 18, 1895, provided as follows:

I, Jacob Haller the within name testator, do hereby make and publish this codicil to be added to my last will and testament, bearing date the thirteenth day of December A. D. 1893 in manner following: I hereby revoke that part of my will and testament marked "Secondly" disposing of my wholesale and retail grocery business and further revoke the nomination and appointment of Mary Haller and John M. Miller as executors and instead thereof, I order and direct my executors hereinafter named to continue my wholesale and retail grocery business for and during such period of time as the same shall be carried on at a reasonable profit. The net profits thereof to be paid to my wife for the support of herself and my children during her natural life but in case she should marry again, then said profits shall be paid by my executors to my children or their legal representatives for their maintenance and support. Whenever said business shall cease to be carried on at a profit, I order and direct my executors to dispose of said business and the "good will" thereof to the best advantage and invest the proceeds thereon in real estate first mortgage securities and pay the interest arising therefrom to my wife for the support of herself and my children remaining at home for and during her natural life or while she remains my widow. At the death of my wife I will, order and direct that said business be sold by my executors if same has not been disposed of before and that the money received by my executors therefor be divided equally among my children. And I nominate,

constitute and appoint my bookkeeper John M. Miller, my son Charles J. Haller and Albert M. Doll Executors of my last will and testament and of this codicil thereto attached.

Parts of the will of Jacob Haller, deceased, are included in the findings of fact made by this Board in *Mary Haller*, 14 B. T. A. 488, and by reference we incorporate herein such parts of the will with the same force and effect as if here set out in full.

23 Jacob Haller was a retail grocer when the petitioner married him and continued in that business up to the time of his death. He also conducted a small wholesale business in fruits and vegetables. At the date of his death he was worth approximately \$25,000, part of which sum represented an investment in real estate. Prior to his death Jacob Haller had said that as each of his sons became of age they would be taken into partnership with him in the grocery business. For some time prior to his death he had been in failing health. In 1891 the oldest son, Charles, left school and entered the business. During his father's absences because of ill health Charles and one John M. Miller, who worked in the store and who later became one of the executors of Haller's will, took charge of the business. The sons, Frank and Edward, also worked in the store at times. None of the sons, however, received any salary until after they respectively arrived at their majority.

After Jacob Haller's death the provisions of his will were discussed by the petitioner and her children and stepsons. They agreed to "stick together" and the sons agreed to remain in the business. In accordance with his father's expressed desire and with the assent of the petitioner and of his co-executors, Charles Haller took charge of the business as managing executor. Although he discussed major problems and policies with the petitioner and his co-executors they did not interfere with his management but allowed him to adopt such policies in the grocery business as he saw fit.

The executors also specifically authorized him to borrow money in amounts necessary for the purposes of the business.

24 About two years after Jacob Haller's death the business was changed to a wholesale grocery business, the retail business being discontinued. The business was carried on

in the name of Jacob Haller or the estate of Jacob Haller. In its books were included all of the affairs of the estate of Jacob Haller. The business increased greatly in amount after the senior Haller's death and at the end of 1923 the total capital and accumulated profits amounted to about \$335,000. During the years subsequent to Jacob Haller's death, including the years 1924 and 1925, the taxable years in question, the petitioner received from the business such sums as she needed for her support. Certain amounts were also drawn by the children and charged against them respectively in the books. The total annual amounts drawn by the petitioner were not large and the balance of the annual profits remained in the business with the assent of the petitioner. She considered that the business was "for the children" and that she and they were to share in its profit in equal amounts.

In 1910 or 1911 the petitioner built a house which was paid for out of the business. By 1912 all of the children had become of age. In 1914, with the consent of the petitioner, there was a distribution of \$4,000 to each of the children of Jacob Haller, and in 1920, again with the petitioner's consent, there was a distribution from the business of \$5,000 to each of the brothers and sisters.

25 During all of the years subsequent to the death of Jacob Haller, Charles Haller was the dominating figure in the grocery business carried on in the name of the estate of Jacob Haller. At the end of each year for several years prior thereto and including the taxable years Charles Haller prepared, or caused to be prepared, a balance sheet showing the condition of the business and he discussed this balance sheet with the petitioner, his brothers, half-sisters and his co-executors. During some of such discussions Charles told his brothers and half-sisters that they were to share equally in any losses of the business as well as in the profits, their mother, the petitioner, having told them that they were to share equally with her in the profits.

As of December 31, 1923, capital accounts were opened in the books of the grocery business for petitioner and the six living children of Jacob Haller. Both the original capital and the accumulated surplus were included in these accounts. These accounts were set up by crediting to each of the daughters and stepsons of the petitioner the sum of \$49,470.83 and to the petitioner the sum of \$38,925.33.

The profits for the respective years 1924 and 1925 were divided equally in the books of the grocery business between the petitioner and her three daughters and three stepsons and they each reported their respective amounts so credited for the taxable years in their respective income tax returns.

No partnership returns for those years were filed. The

26 estate of Jacob Haller, however, filed returns reporting the income of the grocery business for the taxable years in question. In 1925 the petitioner

and her three daughters and three stepsons decided to separate certain real estate from the grocery business and that the petitioner should take such real estate and the daughters and stepsons should take the grocery business.

A formal agreement of partnership having been considered for some time prior to July 1, 1926, on that date Charles J. Haller, Frank A. Haller, Edward W. Haller, Cora H. Gaehr, Leah H. Schubert and Alma H. Way, constituting all of the petitioner's living children and stepchildren, entered into a written agreement of partnership with respect to the wholesale grocery business theretofore carried on under the name of Jacob Haller or the estate of Jacob Haller. In this partnership contract it is recited, among other things, that by agreement between the petitioner and the parties to the contract certain described real estate had been separated from the wholesale grocery business and that petitioner had received such real estate and had transferred and conveyed all her interest in the wholesale grocery business to the parties in the partnership, including in such conveyance the real estate occupied by the grocery business.

The executors of the estate filed no accounting prior to July 26, 1926. On July 26, 1926, the executors filed an account. This account showed a final distribution of the assets of the estate on January 1, 1926, to the petitioner, her three daughters and three stepsons in the total sum of \$346,902.28. This amount was made up of sums standing

27 to the credit of the petitioner and her daughters and stepsons in the general ledger of the business of Jacob Haller as follows: Alma, \$51,730.78; Cora, \$51,734.67; Leah, \$51,780.97; Frank, \$51,714.90; Edward, \$51,677.41; Charles, \$51,383.74; and petitioner, \$36,879.81.

In the deficiency notice addressed to the petitioner the respondent held that the total of the net profits of the whole-

sale grocery business for the respective years 1924 and 1925 was taxable to the petitioner.

Opinion.

VAN FOSSAN :

In *Mary Haller*, 14 B. T. A. 488, deficiencies in the income taxes of the present petitioner for the years 1917 to 1923, inclusive, were in controversy. In opposing those deficiencies the petitioner contended, among other things, that "under the will of Jacob Haller construed in the light of surrounding circumstances at the time of his death one-seventh of the income is distributable to her and one-seventh to each of the six children who were living during the taxable years." Substantially the same contention is made in the present proceeding. In our former decision we held in substance that the will of Jacob Haller and the codicil thereto created for the petitioner a life estate in the net profits of the grocery business, referred to in the findings of fact herein, and that there was nothing in the proof indicating that at the time Jacob Haller executed the codicil and at the time of his death he intended the petitioner and his children to share equally in the profits of the business.

We said: "There is no basis on which we can say
28 that it was the intention of the testator that his widow should be under the duty to pay over to the children any part of the income which, under the will, was payable to her. Nor is there any evidence sufficiently definite to permit us to determine that the operation of the business was continued under any agreement which superseded the provisions of the will." The petitioner contends in this proceeding that there was such an agreement between her and the six living children of Jacob Haller, that an equal partnership in the profits of the business for the years 1924 and 1925 was created thereby. The respondent urges, however, that our decision in the former case is conclusive with respect to the question whether or not, under the will of Jacob Haller, the entire net income of the grocery business was taxable to the petitioner and is also conclusive upon the question whether or not the petitioner, her daughters and stepsons had entered into any agreement prior to December 31, 1923, whereby the provisions of the will were superseded.

It is well settled that, in the absence of fraud or collusion, a judgment of a competent tribunal is conclusive upon the parties thereto and upon those in privity with them as to all questions involved in the controversy. *Russell v. Place*, 94 U. S. 606; *Southern Pacific Railroad v. United States*, 168 U. S. 1; *Northern Pacific Company v. Slaght*, 205 U. S. 122. In *Jahnke Service*, 20 B. T. A. 837, we applied this principle, holding in effect that when a corporate taxpayer's liability for a deficiency in tax has been determined by the Board a

transferee who was a stockholder of the taxpayer
29 would not be heard to contest the taxpayer's liability for the determined deficiency.

The petitioner asserts, however, that the question, whether or not a partnership in the profits of the grocery business was created by agreement between the petitioner and the six living children of Jacob Haller, was not litigated or decided in *Mary Haller, supra*. It may be said, however, that even if that exact question was not decided we held, as hereinbefore stated, that there was no evidence sufficiently definite to permit us to determine that the operation of the business was continued under any agreement which superseded the provisions of Jacob Haller's will.

It was said by the Supreme Court of the United States in *Cromwell v. County of Sac*, 94 U. S. 351, 353:

The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into the judgment, can not again be brought into litigation between the parties in proceedings at law upon any ground whatever.

Applying the principles enunciated by the Supreme Court in the foregoing quotation from *Cromwell v. County of Sac* it follows that our former decision concludes the petitioner from asserting that a partnership in the profits of the grocery business existed at any time during the years in controversy in the former proceedings, i. e., prior to January 1, 1924. In accordance with the same principles our former
30 decision is conclusive as to the construction of the will of Jacob Haller and the codicil thereto to the effect that under the will the children of Jacob Hal-

ler had no legal interest in the net profits of the grocery business. But even if that decision were not conclusive in the respects set forth we find nothing in the will of Jacob Haller or in the codicil thereto or in the facts in evidence in the present proceeding which alters the views concerning the construction of the codicil to the will expressed in our former decision. In accordance with the decisions of the Pennsylvania courts cited in that decision it is clear that, under the terms of the will and codicil, the petitioner had a life estate in the net profits of the grocery business founded by Jacob Haller and to be carried on by his executors. Under the terms of the will and codicil the petitioner was not accountable to any of the children for any part of the net profits. Nor is there convincing evidence in the instant proceeding that she assigned or gave to the children or any of them any part of her beneficial property right in the net profits of the grocery business or in any other way divested herself of any part in that right prior to January 1, 1924.

In *Cromwell v. County of Sac, supra*, the Supreme Court stated further as follows:

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action can not be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

The demand in the present proceeding is for a re-determination of the deficiencies in income taxes for the years 1924 and 1925. These deficiencies were not in controversy in the former proceedings. It may, therefore, be determined whether or not, during the years now in question, a partnership in the profits of the grocery business existed between the petitioner and the six living children of Jacob Haller, deceased. In solving this problem it should be borne in mind that the executors of the will of Jacob Haller had not accounted prior to those years and did not account

during either of those years. During those years the legal title to the assets of the grocery business founded by Jacob Haller and to be carried on by his executors under the terms of the will was still vested in the executors. Under the will the petitioner had no title to the assets of the business. She had only an interest in the business during her lifetime. The petitioner contends, however, that at some time prior to 1924 or at the beginning of that year she permanently and absolutely divested herself of her property right in six-sevenths of the profits of the grocery business, giving one-seventh of this property right to each of the children of Jacob Haller and keeping one-seventh interest for herself. She also contends that both she herself and the six living children allowed the larger portion of the profits accruing to each to accumulate in the business; that there was an understanding that each of the seven would share equally in both the profits and losses of the business; that the setting up of capital accounts as of December 31, 1923, as stated in the findings of fact and the equal distribution of the net profits of the business in 1924 and 1925 were in accordance with such understanding and that, by reason of all these facts, a partnership existed between them during the taxable years now in question.

If the petitioner divested herself of any part of her property right she did so by making a gift of a part of that right to each of the living children of Jacob Haller, deceased. This Board has recently said in *Mary Katharine Dulin et al.*, 25 B. T. A. 1259:

* * * To constitute a gift in contemplation of law, there must be (1) an intention on the part of the donor to give—that is, to surrender complete control and dominion over the property to the donee; (2) there must be an acceptance of the gift by the donee; and (3) there must be a transfer of title accompanied by delivery of the property. *Charles Greenblatt*, 2 B. T. A. 77; *Estate of Davis R. Daly*, 3 B. T. A. 1042; *F. J. Vlcek*, 7 B. T. A. 1244; *J. T. Lupton*, 19 B. T. A. 166.

See also *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287-290; *Edson v. Lucas*, 40 Fed. (2d) 398, 404.

It is our opinion that it is not to be concluded from the evidence in this proceeding that there was an intention on

the part of the petitioner to surrender to the six children of Jacob Haller complete control and dominion over all of her beneficial property right in the grocery business excepting only one-seventh thereof. There is some evidence in the record that it was the "understanding" of the petitioner and Jacob Haller's living children that they
33 were all to share equally in the profits of the business. It seems fairly inferable, however, that this understanding grew out of their own interpretation of the provisions of Jacob Haller's will and codicil. In other words, the petitioner and the six living children understood that the will and codicil of Jacob Haller provided, in effect, that the petitioner and the decedent's children should share equally in the profits of the business. Such an understanding would not supersede the proper interpretation of the codicil under the law nor control its legal incidences. This erroneous understanding of the legal effect of the testament does, however, negative the existence of an intention to make a gift. Petitioner could not intend to give the daughters and sons that which she understood was already theirs.

Likewise, the evidence does not satisfactorily show that any agreement existed between the petitioner and the children in 1924 and 1925 which created a partnership in the profits of the grocery business. Though with the assent of the petitioner, there had been equal distributions of sums of money in 1914 and 1920 we are not convinced by the mere fact of these distributions that the petitioner had divested herself of her property right in the grocery business. The evidence as to the existence of a partnership prior to 1926 leaves too much to inference and conjecture. If a partnership had existed prior to 1926, it would have been normal to dissolve the same when the new partnership among the children and excluding the petitioner was formed. The partnership agreement entered into in July, 1926, however,
34 makes no reference to a pre-existing partnership nor does it purport to be a confirmation of any previous understanding. The language of the contract is that the parties "do hereby form a partnership" and "the date upon which the partnership shall commence shall be January 1, 1926." It is but reasonable to assume that language of different tenor would have been used had the partnership

existed in fact prior thereto. It is likewise significant that no partnership returns were filed for the taxable years.

The fact that in 1923 capital accounts in the name of each of the children were set up on the books is not controlling. This is but one of many facts to be weighed.

In 1926, however, the petitioner appears to have divested herself of all rights in the grocery business and to have received in exchange therefor certain real estate situated in the City of Erie. This arrangement seems to have been entered into with the assent of the executors who filed their final accounting immediately after the partnership agreement was entered into on July 1, 1926, by the daughters and stepsons of Mary Haller. This partnership agreement and the distribution of the estate set forth in the final accounting of the executors disclose that in 1926 the petitioner transferred her interest in the grocery business to her daughters and stepsons and that the daughters and stepsons formed a partnership. These facts are not proof of the contention that the petitioner and the six children of Jacob Haller had, by agreement, created a partnership in the grocery business prior to or during 1924 and 1925.

35 We can not hold on the evidence that the petitioner ever divested herself of her sole right to the net profits of the business or that any of the children ever acquired an enforceable interest in the business prior to the execution of the written partnership instrument in 1926 and the contemporaneous distribution of the estate of Jacob Haller.

From the foregoing it follows that the respondent did not err in holding that the whole of the net profits of the grocery business for the years 1924 and 1925 is taxable to the petitioner.

Decision will be entered for the respondent.

36 United States Board of Tax Appeals, Washington.

Docket No. 39268.

• MARY HALLER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated June 13, 1932, it is ordered and

decided that there are deficiencies of \$1,113.32 and \$3,017.23 for the years 1924 and 1925, respectively.

Enter.

(Signed) ERNEST H. VAN FOSSAM,
Member.

Entered Jun. 16, 1932.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

37

Filed Sept. 13, 1932.

United States Board of Tax Appeals.

Docket #39268.

MARY HALLER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation.

It is hereby stipulated and agreed by and between the respective parties hereto, acting by their respective counsel, that the Court of Appeals of the District of Columbia, may review the decision of the United States Board of Tax Appeals rendered in the above entitled cause. This stipulation is made and entered into under and pursuant to Subdivision (d) of Section 1002 of the Revenue Act of 1926.

WILLIAM J. BYRNE,
Attorney for Petitioner.
C. M. CHAREST,
*General Counsel, Bureau of Internal
Revenue, for the Respondent*

Dated Washington, D. C., this 7th day of September, 1932.

38

Filed Sept. 13, 1932.

In the Court of Appeals of the District of Columbia.

No. —.

MARY HALLER, Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue,
Appellee.

*Petition for the Review of the Decision of the United
States Board of Tax Appeals.*

To the Honorable the Chief Justice and Associate Justices
of the Court of Appeals of the District of Columbia:

Mary Haller, in support of this, her petition filed in pursuance of the provisions of Section 1001 of the Revenue Act of 1926 as amended by Section 1101 (a) of the Revenue Act of 1932, for the review of the decision of the United States Board of Tax Appeals rendered on the 16th day of June 1932, approving deficiencies in income taxes for 1924 and 1925 in the respective amounts of \$1,113.32 and \$3,017.23 respectfully shows to this Honorable Court as follows:

I. Statement of the Nature of the Controversy.

Appellant duly filed with the United States Board of Tax Appeals, pursuant to the provisions of the Revenue Act of 1928, a petition requesting the redetermination of deficiencies in income taxes for the calendar years 1924 and 1925. On August 10, 1928 appellee filed his answer to said petition and the cause being at issue was set for hearing. Testimony was taken upon depositions which were submitted at a hearing had before the Board of Tax Appeals on January 28, 1932.

On June 16, 1932, the Board promulgated its findings of fact, and opinion, which findings of fact are substantially set forth herein as follows:

Appellant resides at Erie, Pa., and is the widow of Jacob Haller, deceased, who died in 1895. Jacob Haller was a

widower at the time of his marriage to appellant and had three sons by his first marriage; viz. Charles, Frank and Edward. Four children were born to Jacob Haller and appellant and at the time of the father's death all of the children were minors. All the children are living except one who died long before the date of these proceedings, and before the taxable years in question.

Jacob Haller's last will and testament and a codicil thereto were admitted to probate in Erie County, Pennsylvania, and letters testamentary issued to the executors named therein. The codicil dated May 18, 1895, provided as follows:

I, Jacob Haller the within named testator, do hereby make and publish this codicil to be added to my last will and testament, bearing date the thirteenth day of December A. D. 1893 in manner following: I hereby revoke that part of my will and testament marked "Secondly" disposing of my wholesale and retail grocery business and further revoke the nomination and appointment of Mary Haller and John M. Miller as executors and instead thereof, I order and direct my executors hereinafter named to continue my wholesale and retail grocery business for and during such period of time as the same shall be carried on at a reasonable profit. The net profits thereof to be paid to
40 my wife for the support of herself and my children during her natural life but in case she should marry again, then said profits shall be paid by my executors to my children or their legal representatives for their maintenance and support. Whenever said business shall cease to be carried on at a profit, I order and direct my executors to dispose of said business and the "good will" thereof to the best advantage and invest the proceeds thereon in real estate first mortgage securities and pay the interest arising therefrom to my wife for the support of herself and my children remaining at home for and during her natural life or while she remains my widow. At the death of my wife I will, order and direct that said business be sold by my executors if same has not been disposed of before and that the money received by my executors therefor be divided equally among my children. And I nominate, constitute and appoint my bookkeeper John M. Miller, my son Charles J. Haller and Albert M. Doll Executors of my last will and testament and of this codicil thereto attached.

Jacob Haller carried on a retail grocery business and also a small wholesale business in fruits and vegetables. When he died he was worth about \$25,000, part of which sum represented an investment in real estate.

Prior to their father's death the sons Charles, Frank and Edward worked in the store at odd times and in 1891 Charles, the eldest, left school and entered the business. For some years prior to his death and during his absences because of his ill health, Charles and John M. Miller, an old employee, took charge of the business. All the sons worked in the store, but none received a salary. When they arrived at their majority, they were to be taken into the business as partners with their father.

After Mr. Haller's death the provisions of the will were discussed between the appellant, and the six children
41 and they all agreed to "stick" together and continue the business. Charles Haller took active charge of the business as managing executor. He discussed the major problems and policies of the business with the appellant, his brothers, sisters and co-executors, who allowed him to adopt such policies in the grocery business as he thought best. He was also specifically authorized to borrow money in amounts necessary for the purposes of the business.

About two years after Jacob Haller's death the business was changed to a wholesale grocery business, the retail business being discontinued. The business was carried on in the name of Jacob Haller or the estate of Jacob Haller. On the books were included all of the affairs of the estate of Jacob Haller. The business increased rapidly under Charles' management and at the end of 1923 the total capital and accumulated profits amounted to about \$335,000.

Appellant has always received such sums as she has needed for her support. In 1910 or 1911 a house was built for the appellant, which was paid for out of the business and was charged to her account on the books. By agreement, distributions of \$4,000 and \$5,000 were made in 1914 and 1920 respectively, to appellant and each of the children. The sums drawn by the appellant and the children were charged against their accounts on the books and the balance of the profits remained in the business, the appellant considering that the business was for the children and that

42 she and the children were to share in its profits equally.

Appellant and the brothers and sisters were continuously advised as to the condition of the business by Charles Haller. Annually since Mr. Haller's death and including the taxable years involved, Charles prepared or caused to be prepared a balance sheet showing the condition of the business and he discussed the balance sheet and condition of the business with Mrs. Haller, his brothers, sisters and co-executors and during these discussions he told the brothers and sisters that they were to share equally in any losses as well as the profits of the business; Mrs. Haller having told them they were to share equally with her in the profits.

As of December 31, 1923, capital accounts for appellant and the children were opened on the books of the grocery business. Both the original capital and the accumulated surplus were included in these accounts. These accounts were set up by crediting to each of the children the sum of \$49,470.83 and to the appellant the sum of \$38,925.33.

The profits for the years 1924 and 1925 were divided equally on the books of the grocery business between appellant and the children and each reported for purposes of income tax, his respective share. No partnership returns as such were filed, but non-taxable returns were filed by the estate of Jacob Haller for the taxable years in question, showing the distribution to appellant and the children.

43 In 1925 appellant and the children agreed to separate certain real estate from the grocery business and appellant received the real estate and the children the grocery business.

A formal agreement of partnership having been considered for some time prior to July 1, 1926, on that date Charles J. Haller, Frank A. Haller, Edward W. Haller, Cora H. Gaehr, Leah H. Schubert and Alma H. Way, constituting all of the children entered into a written agreement of partnership with respect to the wholesale grocery business theretofore carried on under the name of Jacob Haller or the estate of Jacob Haller. In this partnership contract it is recited, among other things, that by agreement between the appellant and the parties to the contract certain described real estate had been separated from the

wholesale grocery business and that appellant had received such real estate and had transferred and conveyed her interest in the wholesale grocery business to the parties in the partnership, including in such conveyance the real estate occupied by the grocery business.

On July 26, 1926, the executors filed their first and final account. This account showed a final distribution of the assets of the estate on January 1, 1926, to appellant and the children in the total sum of \$346,902.28. This amount was made up of sums standing to the credit of the appellant and the children in the general ledger of the business of Jacob Haller as follows: Alma, \$51,730.78; Cora, \$51,734.67; Leah, \$51,780.97; Frank, \$51,714.90; Edward, \$51,677.41; Charles, \$51,383.74; and appellant, \$36,879.81.

44 In the deficiency notice addressed to appellant the appellee held that the entire net income of the wholesale grocery business for the years 1924 and 1925 was taxable to the appellant.

II. Designation of Court of Review.

The appellant, being aggrieved by the said findings of fact, opinion, decision, and order, and in accordance with Section 1002 of the Revenue Act of 1926 has stipulated with the attorney for the appellee that a review of the said findings of fact, opinion, decision and order may be had in the Court of Appeals of the District of Columbia.

III. Assignments of Error.

The appellant, as a basis for review, makes the following assignments of error:

1. The Board erred in holding and/or finding that a partnership did not exist between appellant and her six children and step children Charles J. Haller, Edward W. Haller, Frank A. Haller, Cora Haller Gaehr, Leah Haller Schubert and Alma Haller Way during the taxable years 1924 and 1925.

2. The Board erred in holding and/or finding that the entire net income of the Estate of Jacob Haller for the years 1924 and 1925 was taxable to the appellant.

3. The Board erred in entering judgment for the respondent.

45 Wherefore your appellant prays that this Honorable Court may review said findings, opinion, de-

cision, and order and reverse and set aside the same and that this Court grant such other and further relief as the Court may deem meet and proper in the premises.

MARY HALLER,
By WILLIAM J. BYRNE,
WILLIAM J. BYRNE,
THOMAS J. REILLY,
THOMAS J. REILLY,
Attorneys for Appellant,
Munsey Building, Washington, D. C.

CITY OF WASHINGTON,
District of Columbia, ss:

William J. Byrne, being duly sworn, deposes and says that he is the attorney for the appellant; that he knows the contents of the foregoing petition; that to the best of his knowledge and belief the statements therein are true, and that the assignments of error are well taken and intended to be argued.

WILLIAM J. BYRNE.
WILLIAM J. BYRNE.

Subscribed and sworn to before me this 13th day of September 1932.

[NOTARY SEAL.]

WANDA G. PEARSON,
Notary Public.

My commission expires — — —.

My commission expires May 18, 1936.

46

Filed Sept. 13, 1932.

United States Board of Tax Appeals.

Docket No. 39268.

MARY HALLER, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

Designation of Record.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, on or before November 12, 1932 transmit to the Clerk of the Court of Appeals of the

District of Columbia certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. Petition.
3. Answer.
4. Amendment to petition.
5. Amendment to Answer.
6. Findings of fact, opinion and decision of Board.
7. Petition for review to the Court of Appeals of the District of Columbia.
8. Stipulation under Paragraph (d), Section 1002 of the Revenue Act of 1926, dated September 7, 1932, that the review shall be by the Court of Appeals of the District of Columbia.

47 10. This designation of record.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the Court of Appeals of the District of Columbia.

WILLIAM J. BYRNE,
WILLIAM J. BYRNE,
THOMAS J. REILLY,
THOMAS J. REILLY,
Attorneys for Mary Haller.

September 13, 1932.

Service of a true copy of the above præcipe for the Record is hereby acknowledged this 13 day of September, 1932.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

48 United States Board of Tax Appeals, Washington.

Docket No. 39268.

MARY HALLER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 47, inclu-

sive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 4th day of October, 1932.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk United States Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 5844. Mary Haller, appellant, vs. David Burnet, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Nov. 7, 1932. Henry W. Hodges, Clerk.

FOR MR. JUSTICE VAN ORBELL

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

FEB 15 1933

IN THE

Henry H. Hodges
Court of Appeals, District of Columbia. CLERK

No. 5844.

MARY HALLER, APPELLANT,

v.

DAVID BURNET, COMMISSIONER OF
INTERNAL REVENUE, APPELLEE.

BRIEF FOR APPELLANT.

WILLIAM J. BYRNE,
THOMAS J. REILLY,
Munsey Building,
Washington, D. C.
Attorneys for Appellant.

Of Counsel:

JOSEPH GETZ,
New York, N. Y.

February 15, 1933.

IN THE
Court of Appeals, District of Columbia.

No. 5844.

MARY HALLER, *Appellant*,
v.
DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE, *Appellee*.

BRIEF FOR APPELLANT.

Jurisdiction.

This appeal involves income taxes for the calendar years 1924 and 1925 and is taken from a decision (order of redetermination) entered by the United States Board of Tax Appeals, June 16, 1932. The case is brought to this Court by petition for review filed September 13, 1932 (R. 28), pursuant to Sections 1001 of the Revenue Act of 1926 as amended by Section 1101, of the Revenue Act of 1932, and Sections 1002 and 1003 of the Revenue Act of 1926.

Question Presented.

The sole question presented for decision is: Whether for 1924 and 1925 the entire income of the business known as Jacob Haller estate was taxable to appellant or was properly returned pro rata by appellant and her six children.

Statement of Facts.

In analyzing the pertinent facts as found by the Board we find:

1. Appellant is the widow of Jacob Haller who died in 1895. (R. 16.)
2. His codicil provided in part as follows:

“* * * I order and direct my executors hereinafter named to continue my wholesale and retail grocery business for and during such period of time as the same shall be carried on at a reasonable profit. * * * ”

and

“* * * Whenever said business shall cease to be carried on at a profit, I order and direct my executors to dispose of said business and the ‘good will’ thereof to the best advantage and invest the proceeds thereon in real estate first mortgage securities and pay the interest arising therefrom to my wife for the support of herself and my children remaining at home for and during her natural life or while she remains my widow. * * * ”

and

“* * * At the death of my wife I will, order and direct that said business be sold by my executors if same has not been disposed of before and that the money received by my executors therefor be divided equally among my children. * * * ” (R. 17.)

3. Jacob Haller, deceased, was a retail and wholesale grocer whose three sons worked without salary in the business, having been promised by their father that they would be taken into partnership with him when

they arrived of age. At the date of his death he was worth approximately \$25,000. (R. 18.)

4. After the provisions of the will were read they agreed to "stick together," the sons to remain in the business, with Charles Haller taking charge of the business. About two years after Jacob Haller's death the business was changed to a wholesale grocery business. (R. 18.)

5. At the end of 1923 the capital and accumulated profits totaled approximately \$335,000. (R. 19.)

6. Since Jacob Haller's death, including the years 1924 and 1925, appellant received from the business such sums as she needed for her support and in 1910 or 1911 a house was built for her and paid for out of the earnings of the business. Certain amounts were also drawn by the children and charged against them on the books of the business. In 1914 the children each received \$4,000 and in 1920 each received \$5,000. (R. 19.)

7. The business increased greatly in amount after the senior Haller's death, with Charles Haller as the dominating figure. (R. 19.)

8. As of December 31, 1923, capital accounts were opened in the books of the business for appellant and each of the children and both the original capital and accumulated surplus was included in these accounts. (R. 19.)

9. Appellant considered that the business was

“for the children” and that she and they were to share the profits equally. (R. 19.)

10. For 1924 and 1925 as well as for years prior thereto balance sheets showing the condition of the business were prepared and discussed with Appellant and the children. During these discussions the children were advised that they would share equally in any losses of the business as well as in the profits. (R. 19.)

11. The profits for the respective years 1924 and 1925 were divided equally in the books of the business between Appellant and the children and they each reported their respective amounts so credited for the taxable years in their respective income tax returns. (R. 20.)

12. On July 1, 1926, the children entered in a written partnership contract wherein it is recited that certain real estate had been separated from the wholesale grocery business and received by Appellant and she had conveyed her interest in the wholesale grocery business to the children. (R. 20.)

13. On July 26, 1926, the executors filed a final accounting showing a distribution of the assets of the estate to Appellant and the children in the total sum of \$346,902.28. This sum was made up of sums standing to the credit of appellant and the children in the general ledger of the business. (R. 20.)

14. For 1924 and 1925 the Commissioner of Internal Revenue determined that the entire profits of the business was taxable to Appellant. (R. 21.)

Argument.

It is Appellant's position that for 1924 and 1925 she owned a $1/7$ interest in the income of the business known as Jacob Haller Estate and that the income of this business was properly returned pro rata by herself and her six children.

Counsel believe that this position is supported upon two grounds: First, that Appellant relinquished all interest in the business of Jacob Haller estate in excess of $1/7$ and, Second, Appellant for a good and valuable consideration divested herself of all interest in the business in excess of $1/7$.

We may assume as the Board has held that under the will and codicil Appellant was granted the right to receive the entire profits of the business. However, the Board's findings show she relinquished this right as she wanted the business to be shared equally by herself and the children. As found by the Board:

“* * * She considered that the business was ‘for the children’ and that she and they were to share in its profit in equal amounts.” (R. 19.)

In addition counsel submit that the record shows she divested herself of all interest in the business in excess of $1/7$ for a good and valuable consideration.

In support of this it should be noted that after Jacob Haller's death the provisions of the will were discussed and the Appellant and her children agreed to “stick together,” the sons agreeing to conduct the business as a partnership. Charles Haller agreed to operate the business as managing executor and it was he who was the dominating figure in the grocery business after his father's death. Charles had left school in 1891 and had operated the business for some time prior to his father's death. (R. 18, 19.)

This partnership agreement was fully executed, the children remaining in the business with Charles as the dominating figure. At the end of each year, including the taxable years involved, balance sheets were prepared and discussed by Appellant and the children. During these discussions they agreed to share equally in the losses as well as the profits. (R. 19.) As of December 31, 1923, capital accounts were opened in the business for Appellant and her children wherein a credit of \$49,470.83 was made for each of the children and \$38,925.33 for Appellant. (R. 19.) For 1924 and 1925, the taxable years involved in this appeal, the profits were divided equally on the books of the business and each reported the respective amounts so credited in their respective individual tax returns. (R. 20.)

Furthermore, the final accounting of the estate was contrary to the provisions of the codicil, but was in accordance with this agreement for it showed distributions in accordance with the sums standing to the credit of each on the general ledger of the business. (R. 20.) Thus Appellant's position that the income of the business of Jacob Haller belonged equally to Appellant and the children is fully supported by the record.

That this agreement was beneficial to Appellant is shown by the following analysis:

1. In 1895, when Jacob Haller died, he was worth approximately \$25,000. (R. 19.)

2. Appellant for years subsequent to Jacob Haller's death received such sums as she needed for her support and in 1910 or 1911 a house was built for her and paid for out of the business. (R. 19.)

3. In 1914 a distribution of \$4,000 each was made

to the children and again in 1920 a distribution of \$5,000 each was made to the children. (R. 19.)

4. At the end of 1923 the total capital and accumulated profits of the business totaled approximately \$335,000. (R. 19.)

5. The net income for 1924 was \$23,023.74 and for 1925 was \$39,183.99. (R. 10, 11.)

6. The decedent provided in his codicil as follows:

“* * * I order and direct my executors hereinafter named to continue my wholesale and retail grocery business for and during such period of time as the same shall be carried on at a reasonable profit. * * * ”

and

“* * * Whenever said business shall cease to be carried on at a profit, I order and direct my executors to dispose of said business and the ‘good will’ thereof to the best advantage and invest the proceeds thereon in real estate first mortgage securities and pay the interest arising therefrom to my wife for the support of herself and my children remaining at home for and during her natural life or while she remains my widow. * * * ”
(R. 17.)

Thus under the codicil it was necessary for the business to be operated at a reasonable profit or else be sold. Had it been necessary to sell all of the assets of the estate Appellant would have been entitled to the interest for life on a capital sum of \$25,000. Assuming that the real estate first mortgage securities paid the ordinary 6% interest, an annual gross income of \$1,500

would have been earned by the estate for the support of Appellant and the children remaining at home.

From Jacob Haller's death to December 31, 1923, a period of about 28 years, the estate would have received a gross income of approximately \$42,000. However, by agreeing with the children to "stick together," with the sons who were familiar with the business, operating it, Appellant for all years from 1895 to 1923 was able to withdraw from the business such sums as she needed for her support. (R. 19.) In addition, in 1910 or 1911 she built a house which was paid for out of the business. (R. 19.) On December 31, 1923, she had to her credit \$38,925.33. (R. 19.) For 1924 she was entitled to $1/7$ of \$23,023.74 and for 1925, $1/7$ of \$39,183.99, the net income of the business for these years, respectively. (R. 10, 11.) Thus the wisdom of Appellant's agreement is readily apparent in that her share of the earnings of the business were considerably in excess of the \$1,500 per annum which would have been earned on the original \$25,000. In addition, Appellant was relieved of the responsibility of supporting the children from her income as they shared equally with her and were self sustaining.

Suppose we assume that a suit was instituted in 1924 against Appellant and the children, doing business as partners. Would it not shock the conscience of the court upon the record herein presented to have the children interpose the objection that they were not partners? We may also assume that in 1924 appellant sued the children for an accounting, claiming that the entire income of the business since 1895 belonged entirely to her. The decision in such an action based upon the record herein would surely recognize the agreement between Appellant and the children, the acts of the parties in conformity with the agreement,

and the benefits received by Appellant. In addition the doctrine of estoppel as well as laches would defeat her action.

The Board, however, in affirming the Commissioner of Internal Revenue's determination that the entire income of the business was taxable to Appellant, states (R. 24):

"If the petitioner divested herself of any part of her property right she did so by making a gift of a part of that right to each of the living children of Jacob Haller, deceased. * * * "

Counsel feel that this is an erroneous assumption by the Board in that a good and valuable consideration supported appellant's action in divesting herself of a 6/7 interest in the business.

The Board also states (R. 25):

"* * * If a partnership had existed prior to 1926, it would have been normal to dissolve the same when the new partnership among the children and excluding the petitioner was formed. * * * "

This may be answered by the statement that a partnership by operation of law is dissolved upon the withdrawal of one of its members and a formal agreement of dissolution is unnecessary.

"The consent of the partners to a dissolution may be evinced by their conduct, as where one partner withdraws, or a new partner is admitted, without objection from the others; or when one partner transfers his interest to his copartners, or to a third person without objection from them; * * * " 30 Cyc.-652.

Attention is further directed to that part of the codicil which provides:

“* * * At the death of my wife I will, order and direct that said business be sold by my executors if same has not been disposed of before and that the money received by my executors therefor be divided equally among my children. * * * ” (R. 17.)

The Board, however, in its opinion states (R. 26):

“In 1926, however, the petitioner appears to have divested herself of all rights in the grocery business and to have received in exchange therefor certain real estate situated in the City of Erie. This arrangement seems to have been entered into with the assent of the executors who filed their final accounting immediately after the partnership agreement was entered into on July 1, 1926, by the daughters and stepsons of Mary Haller. This partnership agreement and the distribution of the estate set forth in the final accounting of the executors disclose that in 1926 the petitioner transferred her interest in the grocery business to her daughters and stepsons and that the daughters and stepsons formed a partnership. * * * ”

and (R. 26.)

“We can not hold on the evidence that the petitioner ever divested herself of her sole right to the net profits of the business or that any of the children ever acquired an enforceable interest in the business prior to the execution of the written partnership instrument in 1926 and the contemporaneous distribution of the estate of Jacob Haller.”

Thus it will be seen that the Board clearly recognized and approved as enforceable those acts of Appellant and the children which were in writing although

contrary to the express provisions of the codicil, whereas little consideration is given to those acts which transpired before. As a matter of fact this agreement whereby appellant received certain real estate,—the business remaining with the children was but an outgrowth, an additional step from their previous understanding and agreement which was fully executed although not in writing.

It must be conceded that a partnership of the nature herein involved would ordinarily be informal and its existence should not be judged by mere formalities. In 20 Ruling Case Law, 831, citing many cases, it is stated (par. 36):

“The particular test as to the existence of the partnership relation which is most widely accepted to-day and which is applicable especially between the parties themselves irrespective of the rights of third persons is formed and exists only when it was the intention of the parties that they should be partners.”

It may also be pointed out that the purpose of proceeding contrary to the codicil was not to avoid income taxes, as the agreement was in existence many years prior to the first income tax law.

It would seem that the decision in the Appeal of Charles W. Crane, 19 B. T. A. 577, should be controlling here. The Board there stated, page 579:

“The only issue in this case is whether or not petitioner for income-tax purposes, was the recipient of 40 per cent of the distributable profits of the partnership in question, in the taxable years 1922 and 1923, or only 10 per cent of such profits.

“The respondent’s contention is that petitioner’s two daughters were not members of that partnership, and hence received the parts which they did

receive, only through their father as a member of that firm, and after its legal receipt by him.

“The record in this case clearly shows that C. W. Crane & Co. had no physical assets of any material value; that its entire working capital consisted of its surplus (in cash) and its undivided profits, at times augmented by divided but unreleased profits. All of such assets, that is, the working capital, were subject to the exigencies of the business, and subject to losses. To that extent at least, each and every person owning an interest in that working capital shared in the losses incident to the business. They also owned a proportional share in all the capital assets, if indeed it may be said that the company had any capital assets.

“Summarizing the situation, it appears that each owned an interest in the capital assets; each shared the losses at least to a limited extent, incident to the business; each shared in the profits of the business. *The case is made stronger when all parties concerned recognize, declare and contend that the status of these women was that of partners.*” (Italics supplied.)

Although there is no written instrument whereby appellant divested herself of all interest in the business in excess of 1/7, the acts of all the parties are as conclusive as if there had been a written instrument. In the case of *Copland v. Commissioner of Internal Revenue*, 41 Fed. (2d) 501, Circuit Court of Appeals, 7th Circuit, the court states, page 504:

“The instrument in controversy not only assigns to his wife all of petitioner’s right, title, and interest in and to any profits, issues, and income that may arise thereunder, but also all of his right, title, and interest in and to the syndicate agreement. This assignment includes more than future

income—it includes the thing that produces the income, and the right to receive the income. The fact that petitioner remained liable for the syndicate's losses can not affect the transfer. This was evidently petitioner's wish, and it violates no law."

This Court has also had occasion to pass upon the transfer of a property right. In *Hall v. Burnet*, 60 App. D. C. 332, certiorari denied 52 S. Ct. 408, it is stated (page 333):

"From this it is obvious that if what was here sought to be conveyed from the husband to the wife was salary, or personal earnings, the same would still be taxable to him though he never actually received it, but in the view we take of this case, what was assigned was neither income nor earnings, but property. It was not an assignment of future earnings but the transfer of a property right, and though this property right gave rise to future income, uncertain and contingent though it might be as to amount, that fact does not destroy the distinction. * * *"

In the instant case the facts unquestionably show that Appellant divested herself of all interest in the business in excess of 1/7 and that the business since 1895 belonged equally to Appellant and the children.

Conclusion.

Appellant therefore respectfully submits that she either relinquished or divested herself of all interest in the grocery business in excess of 1/7 and that a partnership existed between the Appellant and the children during the taxable years, and that the Board

of Tax Appeals erred in determining that the whole of the net profits of the grocery business for 1924 and 1925 were taxable to her alone.

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No. 5844

**In the Court of Appeals of the District of
Columbia**

MARY HALLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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INDEX

	Page
Previous opinion.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes involved.....	2
Statement of facts.....	3
Summary of argument.....	10
Argument: No agreement was entered into prior to July 1926, by petitioner with her daughters and stepsons whereby the provisions of Jacob Haller's will were superseded.....	11
Conclusion.....	15

CITATIONS

Cases:

<i>Avery v. Commissioner</i> , 22 F. (2d) 6.....	12
<i>Burnet v. Leininger</i> , 285 U.S. 136.....	14
<i>Copland v. Commissioner</i> , 41 F. (2d) 501.....	14
<i>Cressler's Estate</i> , 161 Pa. St. 427.....	12
<i>Hall v. Burnet</i> , 54 F. (2d) 443, certiorari denied, 285 U.S. 552.....	14
<i>Lucas v. Earl</i> , 281 U.S. 111.....	14
<i>Mazurie's Estate</i> , 132 Pa. St. 157.....	12
<i>Paisley's Appeal</i> , 70 Pa. St. 153.....	12
<i>Tait v. Western Maryland Ry. Co.</i> , 62 F. (2d) 933.....	11
<i>Wickwire v. Reinecke</i> , 275 U.S. 101.....	12
<i>W. K. Henderson Iron Works & Supply Co. v. Blair</i> , 25 F. (2d) 538.....	12

Statutes:

Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 219 (U.S.C., Title 26, Sec. 960).....	2
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 219 (U.S.C. App.; Title 26, Sec. 960).....	3

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS*

BRIEF FOR RESPONDENT

PREVIOUS OPINION

The only previous opinion in the present case is that of the United States Board of Tax Appeals (R. 21-26) which is reported in 26 B.T.A. 395.

JURISDICTION

This proceeding involves income taxes for the calendar years 1924 and 1925 in the respective amounts of \$1,113.32 and \$3,017.23 and is taken from a decision of the Board of Tax Appeals entered June 16, 1932 (R. 26-27). The case is brought to this Court by a petition for review filed September 13, 1932 (R. 28-33), pursuant to the provisions

of Sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109-110 (U.S.C.Supp. VI, Title 26, Secs. 641-642).

QUESTION PRESENTED

Did the taxpayer enter into any agreement with her daughters and stepsons prior to July 1926, which would legally divest her of the income from the estate and thereby supersede the provisions of the will of Jacob Haller her deceased husband, under which she was entitled to such income during life?

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries,
* * *

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * * (U.S.C., Title 26, Sec. 960.)

The pertinent provisions of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U.S.C.App., Title 26, Sec. 960), are identical with the provisions of the Revenue Act of 1924 quoted above.

STATEMENT OF FACTS

The facts as found by the Board of Tax Appeals are as follows (R. 16-21):

The petitioner resides at Erie, Pennsylvania, and is the widow of Jacob Haller, deceased, who died in 1895. The petitioner had not been previously married when she married Jacob Haller but the latter was a widower, having three sons by his first marriage, namely, Charles, Frank, and Edward. Four children were born to Jacob Haller and the petitioner and at the time of his death the ages of the decedent's children were the following: Charles, 20; Frank, 18; Edward, 16; Cora, 13; Otto, 11; Leah, 7; and Alma, 5, the last four named being the children of the petitioner. The son, Otto,

died long before the date of these proceedings, and before the taxable years in question.

Upon his death Jacob Haller's last will and testament and a codicil thereto were duly admitted to probate in Erie County, Pennsylvania, and letters testamentary were issued to the executors, therein named. The codicil which was dated May 18, 1895, provided as follows:

I, Jacob Haller the within named testator, do hereby make and publish this codicil to be added to my last will and testament, bearing date the thirteenth day of December A.D. 1893 in manner following: I hereby revoke that part of my will and testament marked "Secondly" disposing of my wholesale and retail grocery business and further revoke the nomination and appointment of Mary Haller and John M. Miller as executors and instead thereof, I order and direct my executors hereinafter named to continue my wholesale and retail grocery business for and during such period of time as the same shall be carried on at a reasonable profit. The net profits thereof to be paid to my wife for the support of herself and my children during her natural life but in case she should marry again, then said profits shall be paid by my executors to my children or their legal representatives for their maintenance and support. Whenever said business shall cease to be carried on at a profit, I order and direct my executors to dispose of said business and the "good will" thereof to the best advantage

and invest the proceeds thereon in real estate first mortgage securities and pay the interest arising therefrom to my wife for the support of herself and my children remaining at home for and during her natural life or while she remains my widow. At the death of my wife I will, order, and direct that said business be sold by my executors if same has not been disposed of before and that the money received by my executors therefor be divided equally among my children. And I nominate, constitute, and appoint my bookkeeper John M. Miller, my son Charles J. Haller, and Albert M. Doll, Executors of my last will and testament and of this codicil thereto attached.

Parts of the will of Jacob Haller, deceased, are included in the findings of fact made by this Board in *Mary Haller*, 14 B.T.A. 488, and by reference we incorporate herein such parts of the will with the same force and effect as if here set out in full.

Jacob Haller was a retail grocer when the petitioner married him and continued in that business up to the time of his death. He also conducted a small wholesale business in fruits and vegetables. At the date of his death he was worth approximately \$25,000, part of which sum represented an investment in real estate. Prior to his death Jacob Haller had said that as each of his sons became of age they would be taken into partnership with him in the grocery business. For some time prior to his death he had been in failing health. In 1891

the oldest son, Charles, left school and entered the business. During his father's absences because of ill health Charles and one John M. Miller, who worked in the store and who later became one of the executors of Haller's will, took charge of the business. The sons, Frank and Edward, also worked in the store at times. None of the sons, however, received any salary until after they respectively arrived at their majority.

After Jacob Haller's death the provisions of his will were discussed by the petitioner and her children and stepsons. They agreed to "stick together" and the sons agreed to remain in the business. In accordance with his father's expressed desire and with the assent of the petitioner and of his co-executors, Charles Haller took charge of the business as managing executor. Although he discussed major problems and policies with the petitioner and his co-executors they did not interfere with his management but allowed him to adopt such policies in the grocery business as he saw fit. The executors also specifically authorized him to borrow money in amounts necessary for the purposes of the business.

About two years after Jacob Haller's death the business was changed to a wholesale grocery business, the retail business being discontinued. The business was carried on in the name of Jacob Haller or the estate of Jacob Haller. In its books were included all of the affairs of the estate of Jacob

Haller. The business increased greatly in amount after the senior Haller's death and at the end of 1923 the total capital and accumulated profits amounted to about \$335,000. During the years subsequent to Jacob Haller's death, including the years 1924 and 1925, the taxable years in question, the petitioner received from the business such sums as she needed for her support. Certain amounts were also drawn by the children and charged against them respectively in the books. The total annual amounts drawn by the petitioner were not large and the balance of the annual profits remained in the business with the assent of the petitioner. She considered that the business was "for the children" and that she and they were to share in its profits in equal amounts.

In 1910 or 1911 the petitioner built a house which was paid for out of the business. By 1912 all of the children had become of age. In 1914, with the consent of the petitioner, there was a distribution of \$4,000 to each of the children of Jacob Haller, and in 1920, again with the petitioner's consent, there was a distribution from the business of \$5,000 to each of the brothers and sisters.

During all of the years subsequent to the death of Jacob Haller, Charles Haller was the dominating figure in the grocery business carried on in the name of the estate of Jacob Haller. At the end of each year for several years prior thereto and including the taxable years Charles Haller prepared,

or caused to be prepared, a balance sheet showing the condition of the business and he discussed this balance sheet with the petitioner, his brothers, half-sisters and his co-executors. During some of such discussions Charles told his brothers and half-sisters that they were to share equally in any losses of the business as well as in the profits, their mother, the petitioner, having told them that they were to share equally with her in the profits.

As of December 31, 1923, capital accounts were opened in the books of the grocery business for petitioner and the six living children of Jacob Haller. Both the original capital and the accumulated surplus were included in these accounts. These accounts were set up by crediting to each of the daughters and stepsons of the petitioner the sum of \$49,470.83 and to the petitioner the sum of \$38,925.33.

The profits for the respective years 1924 and 1925 were divided equally in the books of the grocery business between the petitioner and her three daughters and three stepsons and they each reported their respective amounts so credited for the taxable years in their respective income tax returns. No partnership returns for those years were filed. The estate of Jacob Haller, however, filed returns reporting the income of the grocery business for the taxable years in question. In 1925 the petitioner and her three daughters and three stepsons decided to separate certain real estate from the grocery business

and that the petitioner should take such real estate and the daughters and stepsons should take the grocery business. A formal agreement of partnership having been considered for some time prior to July 1, 1926, on that date Charles J. Haller, Frank A. Haller, Edward W. Haller, Cora H. Gaehr, Leah H. Schubert and Alma H. Way, constituting all of the petitioner's living children and stepchildren, entered into a written agreement of partnership with respect to the wholesale grocery business theretofore carried on under the name of Jacob Haller or the estate of Jacob Haller. In this partnership contract it is recited, among other things, that by agreement between the petitioner and the parties to the contract certain described real estate had been separated from the wholesale grocery business and that petitioner had received such real estate and had transferred and conveyed all her interest in the wholesale grocery business to the parties in the partnership, including in such convenience the real estate occupied by the grocery business.

The executors of the estate filed no accounting prior to July 26, 1926. On July 26, 1926, the executors filed an account. This account showed a final distribution of the assets of the estate on January 1, 1926, to the petitioner, her three daughters and three stepsons in the total sum of \$346,902.28. This amount was made up of sums standing to the credit of the petitioner and her daughters and stepsons in the general ledger of the business of Jacob Haller

as follows: Alma, \$51,730.78; Cora, \$51,735.67; Leah, \$51,780.97; Frank, \$51,714.90; Edward, \$51,677.41; Charles, \$51,383.74; and petitioner, \$36,879.81.

In the deficiency notice addressed to the petitioner the respondent held that the total of the net profits of the wholesale grocery business for the respective years 1924 and 1925 was taxable to the petitioner.

The parts of the will of Jacob Haller to which the Board refers on page 18 of the record and incorporates in its findings by reference will be found on pages 489 and 490 of 14 B.T.A.

The Board held that its decision in 14 B.T.A. 488 was conclusive upon the question of the proper construction of the will of Jacob Haller and upon the question whether Mary Haller had prior to December 31, 1923, entered into any agreement with her daughters and stepsons whereby the provisions of Jacob Haller's will were superseded, and the petitioner has brought the case to this Court for review.

SUMMARY OF ARGUMENT

Petitioner failed to sustain the burden of proving that a legally enforceable agreement had been made between herself and her daughters and stepsons prior to July 1, 1926, whereby she had transferred to the said children the right to receive six sevenths of the income of the grocery business, disposed of by the will of her late husband Jacob Haller. Therefore the Board of Tax Appeals prop-

erly sustained the determination of the respondent that under the will and codicil of Jacob Haller, deceased, petitioner, as life tenant, was entitled to the entire income from the estate.

ARGUMENT

No agreement was entered into prior to July 1926 by petitioner with her daughters and stepsons whereby the provisions of Jacob Haller's will were superseded

Petitioner contends that an arrangement was made or an understanding had with her three stepsons and three daughters as a result of which she surrendered sixth sevenths of the income to which she was entitled under the will and codicil of her late husband Jacob Haller.

Respondent asserted deficiencies for the years 1924 and 1925 holding that petitioner was entitled to the income during her life. The Board of Tax Appeals had previously considered the same question on an appeal by the petitioner involving the taxable years 1917 to 1923, inclusive, and had decided the same issue adversely to petitioner. Respondent raised the issue of *res judicata* in the present proceeding.¹ The Board although uphold-

¹ We make no argument in support of the Board's decision on the doctrine of *res judicata*, because we are taking a contrary position in the case of *Tait, Collector, v. Western Maryland Ry. Co.* 62 F. (2d) 933 (C.C.A. 4th), wherein the Government has applied for certiorari by petition filed April 7, 1933, No. 842, October Term 1932. In deference to the decision of the Board of Tax Appeals, we submit the question for the consideration of this Court.

Cert granted 289 U.S. 717 C.C.A. affirmed
289 U.S. 620

ing the view that the former decision was *res judicata* nevertheless considered the question on the facts presented and found against petitioner. It is settled that the determination of the Commissioner is *prima facie* correct and the burden of proof is upon petitioner to establish her claim by a fair preponderance of the evidence. *Wickwire v. Reinecke*, 275 U.S. 101; *Avery v. Commissioner*, 22 F. (2d) 6 (C.C.A. 5th); *W. K. Henderson Iron Works and Supply Co. v. Blair*, 25 F. (2d) 538. This petitioner has failed to do. (R. 26.) We therefore submit that on the law and the evidence the Board committed no error in finding that petitioner had not sustained the burden of proof and properly upheld respondent's determination.

Petitioner concedes (Br. 5) that under Pennsylvania law Jacob Haller's will gave petitioner the entire income from the grocery business. If there were any doubt upon this question it would be dispelled by the decisions of the Pennsylvania courts. *Paisley's Appeal*, 70 Pa. St. 153; *Mazurie's Estate*, 132 Pa. St. 157, 19 Atl. 29; *Cressler's Estate*, 161 Pa. St. 427, 29 Atl. 90. Petitioner seeks to show that she and her daughters and stepsons entered into an agreement which superseded the provisions of the will. It is conceded (Br. 4) that no written agreement was entered into prior to July 1, 1926, between petitioner and the children. On that date the written agreement made recited that appellant had conveyed her interest in the wholesale grocery

business to the children. On July 26, 1926, the executors filed a final account showing distributions (R. 20). Petitioner's claims to a previous understanding is admitted not to be in writing (Br. 11).

Petitioner contends (Br. 11) that the purpose of the understanding or agreement was not to avoid income taxes, as the agreement was in existence many years prior to the first income tax law, but capital accounts were not opened until December 31, 1923 (R. 19). Profits were divided on the books for the years 1924 and 1925 (R. 20).

It is insisted that no evidence has been adduced as to when the understanding or agreement was entered into. Petitioner considered that the business was "for the children" and that she and they were to share in its profit in equal amounts (R. 19). Charles Haller prepared balance sheets and discussed them with his brothers, half-sisters, and petitioner, during some of which he told them that they would share equally in any losses of the business (R. 19). It does not appear where the children would get the money to make good losses except by gift from their mother (petitioner).

The Board found (R. 20) that at some time in 1925 the petitioner, her three daughters and her three stepsons decided to separate certain real estate from the grocery business and that petitioner should take such real estate and that the daughters and stepsons should take the grocery business.

Just when this plan was carried into effect does not appear. The partnership agreement of July 1, 1926, between the daughters and the stepsons recites that the plan had been put through, that the petitioner had received certain real estate and had transferred her interest in the grocery business to her daughters and her stepsons but the record does not show whether that was done in 1925 or 1926. The record therefore fails to show any legally enforceable agreement entered into in 1924 or 1925 whereby the provisions of the will were superseded. Thus the income was the property of the widow and was taxable to her notwithstanding her intention that they should all "stick together" and participate in its distribution (*Lucas v. Earl*, 281 U.S. 111). The most that can be claimed by petitioner is that by an arrangement not proved to be a legally enforceable agreement, petitioner had an understanding that the business of her late husband should be carried on as a partnership. It being admitted that the income vested in her, taxation could not be avoided "by anticipatory arrangements and contracts however skilfully devised" to avoid liability for the tax (*Lucas v. Earl*, *supra*, p. 115; *Burnet v. Leininger*, 285 U.S. 136, 142).

The cases of *Copland v. Commissioner*, 41 F. (2d) 501 (C.C.A. 7th), and *Hall v. Burnet*, 55 F. (2d) 443 (App. D.C.), certiorari denied, 285 U.S. 552, cited by petitioner (Br. 12, 13), are distinguishable on the facts. In each of those cases there was proved an assignment of the property out of which

the income was produced. Here while the petitioner claims an understanding or agreement that created the partnership, such claim is not sustained by the proof, but it appears that at most petitioner sought to assign six sevenths of the income, which under the will became first vested in her. Therefore this case is controlled by the doctrine announced in *Burnet v. Leininger, supra*. In this connection it is significant that no partnership returns were filed in 1924 and 1925 (R. 20) and that the final account of the executors was filed July 26, 1926, showing final distribution of the estate January 1, 1926 (R. 20).

CONCLUSION

It is respectfully submitted that the decision of the Board of Tax Appeals should be affirmed.

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